STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 21, 2007
v	No. 268770 Wayne Circuit Court
ANTONIO TERRENCE COLEMAN, Defendant-Appellant.	LC No. 05-001898-01

Before: Whitbeck, C.J., and Wilder and Borrello, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of armed robbery, MCL 750.529, possession of a firearm by a felon, MCL 750.224f, and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced as a fourth habitual offender under MCL 769.12 to 20 to 30 years' imprisonment for the armed robbery, and three to five years' imprisonment for the possession of a firearm by a felon, to be served consecutive to two years' imprisonment for the possession of a firearm during the commission of a felony. We affirm.

Defendant's convictions arise out of the armed robbery of $20,000 in cash from Jerome Yono in the parking lot of the Super Y Market in Romulus on January 6, 2005. At approximately 3:20 p.m. that day, Yono, the store manager, was returning to the store from the bank carrying $20,000 in cash for the store's check-cashing business. A man later identified as defendant yelled "Jerome," and grabbed Yono from behind by his collar while holding a gun to his head. Yono threw the bag containing the cash toward the doors of the store. Defendant dragged Yono behind a truck and demanded money. Yono pointed toward the bag and told defendant that he had thrown it on the ground. Defendant retrieved the bag and got into the passenger side of an awaiting gold-colored sport utility vehicle ("SUV") which left the scene. The storeowner had observed the vehicle pulling in and out of parking spaces several hours before the robbery, and became suspicious. He wrote down the vehicle's license plate number, which he later gave to the police. Witnesses identified defendant as the perpetrator at a photographic lineup.

Defendant argues on appeal that the trial court abused its discretion by denying his motions for a mistrial. We disagree. "We review for an abuse of discretion a trial court's decision on a motion for a mistrial." *People v Bauder*, 269 Mich App 174, 194; 712 NW2d 506 (2005). The abuse of discretion standard acknowledges that there may be more than one reasonable and principled outcome. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719

NW2d 809 (2006); *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003). An abuse of discretion occurs when the trial court's decision is outside the range of reasonable and principled outcomes. *Maldonado, supra* at 388; *Babcock, supra* at 269.

A motion for a mistrial should be granted "'only for an irregularity that is prejudicial to the rights of the defendant and impairs his ability to get a fair trial.'" *Bauder, supra* at 195, quoting *People v Ortiz-Kehoe*, 237 Mich App 508, 514; 603 NW2d 802 (1999). Thus, absent a showing of prejudice, reversal is not warranted. *People v Wells*, 238 Mich App 383, 390; 605 NW2d 374 (1999).

Defendant contends that the trial court should have granted his motion for a mistrial when the officer in charge, Detective-Sergeant Jeffrey Lazarski, referred to defendant's mugshot, which defendant contends placed his criminal history before the jury. During Lazarski's direct examination, the following colloquy occurred:

> *Q*. After this photo lineup was conducted, what is the next thing that you do in this case?
>
> *A*. Well I realize that this photo was two years old and I wanted – I ran a criminal history on [defendant] to find out if he had more recent mugshots with any police department in the United States.
>
> *Q*. Did you find anymore [sic] recent mugshots?

Thereafter, defense counsel objected and moved for a mistrial on the basis that Lazarski's testimony interjected other bad acts evidence before the jury.

This Court has held that where a defendant does not testify, testimony regarding his mugshot impermissibly places his criminal record before the jury. *People v Embry*, 68 Mich App 667, 670; 243 NW2d 711 (1976). But in the instant case, the existence of defendant's criminal record was before the jury at the outset, by virtue of the felon in possession of a firearm charge, which required the prosecutor to prove that defendant had previously been convicted of a felony. See MCL 750.224f. In fact, during his opening statement, the prosecutor briefly recited the elements of all three charged offenses, and said: ". . . we have charged [defendant] with the crime called felon in possession of a firearm. [Defendant] has previously been convicted of a felony and his rights to possess, to use, transport a firearm in the State of Michigan have not been restored." Accordingly, Lazarski's testimony regarding defendant's mugshot did not alert the jury to the possible existence of defendant's criminal history. In fact, defendant ultimately stipulated that he had previously been convicted of a felony, and that his right to possess a firearm had not been restored.

Moreover, the trial court's comprehensive cautionary instruction was sufficient to cure any prejudice resulting from the mugshot testimony:

> Ladies and gentlemen, you have heard evidence that the police may have obtained a mug shot of the defendant. You may not use this evidence to conclude that the defendant did anything improper.

You may only use this evidence in determining the reliability of the identification of the defendant by the witnesses.

Ladies and gentlemen, we have inadvertently been informed of certain information, information which has nothing to do with the issues before you in this case.

You are hereby instructed that the information concerning other possible arrest[s] of [defendant] do not and cannot enter into your consideration of the charges against the defendant.

To consider those charges would be highly unfair and would violate your duty a[s] jurors to fairly and truly render a decision based only on the evidence that this Court rules to be admissible.

The mere fact that [defendant] is on trial is no[t] proof that he did anything wrong. The fact that the defendant was arrested in this case does not mean that he did anything wrong.

[Defendant] has a right to be present here at trial just as any one of us has a right to be present and to see, hear, and challenge the accusations that some wrongs were committed.

This right is guaranteed by the laws of our country and the constitution. We should not take this right lightly.

We do not take lightly the right to a fair trial where only legally admissible evidence is considered in rendering a decision.

Such evidence must convince you beyond a reasonable doubt that each and every element of the offense or offenses were charged and have been proven by the prosecution or you cannot return a verdict of guilt as to the charge or charges against [defendant].

Defendant argues that this cautionary instruction only highlighted the irregularity, and could not have eradicated the testimony from the jurors' minds. He further points to the testimony of lay witness Ronald Carriveau, which he contends evidences Lazarski's "habit of exposing [defendant's] prior record[.]" Defense counsel questioned Carriveau as follows:

Q. What date did you go out to Oakland County?

A. From what I remember, it was right after Oakland County had picked [defendant] up on something else.

Q. Excuse me. Didn't even ask you that, did I, sir?

A. That's -- no, you didn't.

Q. Who gave you that information, sir?

A. He was already incarcerated, sir.

Q. Excuse me. Listen to my question. It's not hard. Who gave you that information?

A. Officer Lazarski, sir.

The cautionary instruction previously recited was sufficient to cure any prejudice from Carriveau's testimony. Moreover, because of the overwhelming evidence against defendant, any irregularity regarding his criminal record did not impair his ability to receive a fair trial. *Bauder, supra* at 195; *Ortiz-Kehoe, supra* at 514.

The prosecutor presented evidence that the storeowner observed a gold-colored SUV pulling in and out of parking spaces in the parking lot. He became suspicious and wrote down the vehicle's license plate number. The vehicle was registered to Joan Dunn, who testified that she lent defendant her SUV to pick up supplies that he needed to perform work around her house. A car registered to defendant was parked in Dunn's driveway while he borrowed her SUV. When defendant returned Dunn's vehicle later that day, he had no supplies. When the police arrested defendant the day after the robbery, they recovered $3,947 in cash from his person and $2,600 in cash from his vehicle. In addition, several witnesses, including Yono, identified defendant at a photographic lineup.

Further, defendant made several incriminating statements after his arrest. Lazarski asked defendant if he knew Dunn, and he shook his head. When Lazarski told defendant that Dunn's SUV was used to commit a crime and might be forfeited, however, defendant responded, "[expletive deleted] her she's got a good job she can buy a new one." When asked about the money that was found on his person and in his vehicle when he was arrested, defendant claimed that he owned two businesses, but was unable to verify this. Moreover, when asked about the rest of the money, defendant replied that he could use it to hire a lawyer and abruptly added, "if I had it." Thus, the evidence against defendant was substantial, even overwhelming, and any error with respect to testimony concerning his criminal history was not so prejudicial that it denied him a fair trial. The trial court therefore did not abuse its discretion by denying defendant's motion for a mistrial.

Defendant also argues that the trial court should have granted his motion for a mistrial when Lazarski informed the jury that defendant was facing life imprisonment. During Lazarski's direct examination, he testified as follows:

A. I wanted the rest of the money and I said if [defendant] gave me or told me where the rest of the money was I could talk to the prosecutor and see if that would go in his favor.

Q. Okay. What was [defendant's] response to that.

A. His demeanor changed and he told me that armed robbery was a floater which I know it means to be you get life in prison for.

Defense counsel immediately objected and renewed his motion for a mistrial, which the trial court denied.

A volunteered and unresponsive answer to a proper question generally does not warrant granting a motion for a mistrial. *People v Haywood*, 209 Mich App 217, 228; 530 NW2d 497 (1995). But a police witness has a special obligation not to venture into forbidden matters while testifying. *People v Holly*, 129 Mich App 405, 415-416; 341 NW2d 823 (1983). When a police officer makes an unresponsive remark, we scrutinize it to ensure that it has not prejudiced the defendant. *Id.* at 415.

Considering the overwhelming evidence against defendant outlined above, we conclude that the fleeting reference to defendant's possible sentence did not prejudice him and impair his ability to receive a fair trial. *Bauder, supra* at 195; *Ortiz-Kehoe, supra* at 514. Moreover, the trial court instructed the jurors that the possible penalty should not influence their decision. Jurors are presumed to follow instructions. *Bauder, supra* at 195. Accordingly, the trial court did not abuse its discretion by denying defendant's motion for a mistrial on this basis.

Affirmed.

/s/ William C. Whitbeck
/s/ Kurtis T. Wilder
/s/ Stephen L. Borrello